NO. 46969-3-II

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION II

STATE OF WASHINGTON, Respondent

v.

KARL STEPHEN HANNA, Appellant

FROM THE SUPERIOR COURT FOR CLARK COUNTY
CLARK COUNTY SUPERIOR COURT CAUSE NO.13-1-01994-9

BRIEF OF RESPONDENT

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RESPONSE TO ASSIGNMENTS OF ERROR

I. **The trial court's comment on the evidence was invited, precluding her complaint that the instruction was given**

II. **The defendant waived assignment of error 7, and issue pertaining to assignment of error 2**

III. **The evidence is sufficient to sustain the jury's finding that the defendant abused a position of trust in the commission of his crimes**

IV. **Whether resentencing is required**

V. **Hanna was not prejudiced by Instruction 19**

STATEMENT OF THE CASE

The State agrees with the recitation of facts set forth by the defendant. The State adds the following additional facts:

Blake Stepper is L.S.'s father. RP 150. Blake gets along well with L.S.'s mother, Christina. Id. There was a time in 2012 when Blake lived with the Zook family in the Camas area. RP 151-52. There were a number of people living at the Zook home, including Blake and his two children (when they visited him), Dominic and Yvonne Zook and their three children, and the defendant. RP 152-52, 278. The Zooks lived on the top floor of the three story home, while the defendant occupied the bottom floor and Blake and his two kids slept on the main floor. RP 153. Mr. Zook is Blake's cousin. RP 152. L.S. and her brother visited Blake up to

every weekend. RP 153. The defendant would occasionally take L.S. and the other children places like Lewisville Park, Kid Zone, or the Minit Mart. RP 154. The defendant would take the children in his car, and he had Blake's permission. RP 154-55. Trips to the Minit Mart were usually for a treat. RP 155.

Blake and Christina's custody arrangement in 2012 was for the children to be with her during the week, and with Blake on the weekends. RP 162. Just prior to Christmas that year, L.S. asked Christina to come back into her bedroom after Christina kissed her goodnight and told her that the defendant had been touching her. RP 164. L.S. appeared timid as she made the disclosure. RP 165. Christina recalled that L.S. used the word "privates" to describe where she'd been touched and pointed to her pubic area. RP 165. L.S. said it happened while she and the defendant were watching movies downstairs at Blake's house. RP 166. Christina became very upset and was unable to question L.S. RP 166. Instead, she called Blake. RP 166. Blake called the police the day after Christina called him. RP 156.

Since being molested by the defendant, L.S. was having trouble sleeping and sharing her feelings, and she was having trouble in school. RP 168. At the time of trial L.S. was going to counseling every week. RP 168.

Yvonne Zook testified that she has known the defendant for about thirteen years, and that he is a family friend. RP 295. The defendant lived with the Zooks in 2012. RP 295. Blake Stepper also lived with the Zooks for about six months in 2012. RP 296. Blake's children stayed with him at the Zooks' home almost every weekend. RP 296. The children were allowed to go down to the bottom floor where the defendant lived because the defendant had a large television that he allowed the children to watch. RP 297. Also, Mrs. Zook didn't want the children to be making noise on the top floor because she had a new infant, or on the stairs between the floors. RP 298. As a result, the children frequently spent their time playing downstairs or outside. RP 299.

ARGUMENT

I. The trial court's comment on the evidence was invited, precluding his complaint that the instruction was given

The trial court, at Hanna's request, gave WPIC instruction 300.16, which states:

> An "ongoing pattern of sexual abuse" means multiple incidents of abuse over a prolonged period of time. The term "prolonged period of time" means more than a few weeks.

This instruction has now been deemed to contain a comment on the evidence insofar as it sets forth "a few weeks" as constituting a prolonged

period of time. *State v. Brush*, 183 Wn.2d 550, 559, 353 P.3d 213 (2015). Whether a particular period of time constitutes a "prolonged period of time" is solely a question for the jury. *Id.*

However, as noted, the defendant proposed this instruction. CP 31. As such, he cannot complain that the instruction was given:

> We affirm our holding in *Studd*. " ' "[A] party may not request an instruction and later complain on appeal that the requested instruction was given." ' " *Studd*, 137 Wn.2d at 546, 973 P.2d 1049 (quoting *State v. Henderson*, 114 Wn.2d 867, 870, 792 P.2d 514 (1990) (emphasis omitted in *Studd*) (quoting *State v. Boyer*, 91 Wn.2d 342, 345, 588 P.2d 1151 (1979))).

City of Seattle v. Patu, 147 Wn. 2d 717, 721, 58 P.3d 273, 274 (2002), citing *State v. Studd*, 137 Wn.2d 533, 546, 973 P.2d 1049 (1999).

Because this error is invited, this assignment of error is meritless. The State addresses this instruction further in section four, below.

II. The defendant waived assignment of error 7, and issue pertaining to assignment of error 2.

At page 2 of the Brief of Appellant, Hanna claims, in assignment of error 7, that there was insufficient evidence to sustain the jury's finding that there was an ongoing pattern of sexual abuse against a minor. Again at page 2, Hanna sets forth, as an issue pertaining to assignment of error, that there was insufficient evidence to support the jury's finding that there was an ongoing patter of sexual abuse against a minor.

The manner in which Hanna organizes his brief is confusing. In the body of his brief, he uses a first level heading (labeled "01") to address the alleged unlawfulness of the exceptional sentence, and uses second level headings (under section 01) to address each issue pertaining to assignment of error (that he then labels 01.1, 01.2, and 01.3). He then addresses the fourth issue pertaining to assignment of error as a first level heading, labeled "0.2." A diligent search of Hanna's brief reveals that he only actually discusses, in his argument section, four of his five issues pertaining to assignment of error. Hanna fails to address, in his argument section, his claim that the evidence is insufficient to support the jury's finding that there was an ongoing pattern of sexual abuse of a minor. Hanna addresses the claim that the instruction defining "prolonged period of time" is an unconstitutional comment on the evidence, and argues that the presumption of prejudice that flows from a comment on the evidence has not been overcome, but he never argues that the *evidence is insufficient* to sustain the jury's finding on this point. He waived that assignment of error by failing to make any argument to support it. *Cowiche Canyon v. Bosley*, 118 Wn.2d 801, 809, 828 P.3d 549 (1992) (assignment of error is waived where "no argument" is presented in the opening brief on the assignment of error).

III. The evidence is sufficient to sustain the jury's finding that the defendant abused a position of trust in the commission of his crimes

Hanna claims that insufficient evidence supports the jury's finding that he violated a position of trust in the commission of his crimes. The State disagrees.

The test for determining whether evidence is sufficient to support a jury's finding of aggravating circumstances is whether, after viewing the evidence in the light most favorable to the State, any rational trier of fact could have made that finding beyond a reasonable doubt. *State v. Gordon*, 172 Wn.2d 671, 680, 260 P.3d 884 (2011). An appellant challenging the sufficiency of evidence presented at a trial "admits the truth of the State's evidence" and all reasonable inferences therefrom are drawn in favor of the State. *State v. Goodman,* 150 Wn.2d 774, 781, 83 P.2d 410 (2004). When examining the sufficiency of the evidence, circumstantial evidence is just as reliable as direct evidence. *State v. Delmarter*, 94 Wn.2d 634, 638, 618 P.2d 99 (1980). The appellate court's role does not include substituting its judgment for the jury's by reweighing the credibility of witnesses or importance of the evidence. *State v. Green*, 94 Wn.2d 216, 221, 616 P.2d 628 (1980). "'It is not necessary that [we] could find the defendant guilty. Rather, it is sufficient if a reasonable jury could come to this conclusion.'" *United States v. Enriquez-Estrada*, 999 F.2d 1355, 1358

(9th Cir. 1993) (overruled in part on other grounds, *United States v. Peterson,* 140 F.3d 819, 822 (9th Cir. 1998)), (quoting *United States v. Nicholson*, 677 F.2d 706, 708 (9th Cir. 1982)).

The two factors this Court must consider in determining whether the defendant abused a position of trust are the duration and the degree of the relationship. *State v. Grewe*, 117 Wn.2d 211, 218, 813 P.2d 1238 (1991); *State v. Fisher*, 108 Wn.2d 419, 427, 739 P.2d 683 (1987). The Supreme Court noted in *Fisher*:

> A relationship extending over a longer period of time, or one within the same household, would indicate a more significant trust relationship, such that the offender's abuse of that relationship would be a more substantial reason for imposing an exceptional sentence.

Fisher at 427.

In *State v. Grewe,* supra, the Supreme Court found sufficient evidence that the defendant abused a position of trust where the defendant attempted to rape an eight year-old girl who lived next door to him. The victim, as well as other children, often visited the defendant's house to play with his piano and computer. The rape occurred on an occasion when the victim was alone in the defendant's house with him and he placed his hand inside her pants and attempted to insert his finger into her vagina. The victim ran away after hitting the defendant in the face. *Grewe* at 213-14.

In finding sufficient evidence that the defendant abused a position of trust in attempting to rape the eight year-old victim, the Court relied on the fourth month relationship between the defendant and the young victim, as well as the victim's age:

> The State argues with substantial merit that the defendant's 4-month relationship with the victim here exceeded that in either *Stuhr* or *Campas*. However, the element which truly distinguishes this case is the victim's age. The case law of this state consistently acknowledges children as among the most vulnerable members of society. One aspect of children's extreme vulnerability is their tendency to trust. Arguably, defendant preyed upon this tendency by luring the victim into his house to play with his piano and computer, thereby establishing a relationship of trust.

Grewe at 220-21, referencing *State v. Stuhr*, 58 Wn.App. 660, 794 P.2d 1297 (1990) and *State v. Campas*, 59 Wn.App. 561, 799 P.2d 744 (1990). (Other internal citations omitted).

This case is like *Grewe.* The defendant had at least a six month relationship with L.S. and lived with her father. The defendant obtained permission from L.S.'s father to take her to fun places in his truck, and he capitalized on L.S. spending time in the basement of the house (where the defendant lived) because Mrs. Zook placed restrictions on where the children could go in the home (due to her wanting it quiet so her infant could sleep). He abused the trust placed in him not only by L.S. but also

by her father. It is axiomatic that L.S. was not the one in a position to decide whether to go places with the defendant—her father was.

Hanna places singular focus on the fact that he was not L.S.'s official caregiver. This argument fails for two reasons: First, neither the statute nor case law requires that a person be a caregiver in order to be deemed in a "position of trust." Indeed, the defendant cites no authority which holds that being a caregiver is anything other than a factor to be considered. Second, the defendant was, in fact, placed in a caregiver position for L.S. When the defendant took L.S. places with her father's permission, such as the park or to the store, he placed himself in a caregiver role for the period of time that L.S.'s father entrusted her to the defendant's care. L.S., after all, did not drive herself to the store or to the park. Taking the evidence in the light most favorable to the State, it is sufficient to sustain the jury's finding that Hanna abused a position of trust in order to commit his crimes.

IV. Whether resentencing is required

The State agrees that if this Court were to reverse at least one of the aggravating factors, resentencing is required because the trial court did not set forth a severability clause whereby it declared that the sentence in this case would remain the same even if the sentenced was based on a

single aggravating factor. The court announced that the sentence was appropriate in light of "the three factors." RP 405.

V. Hanna was not prejudiced by Instruction 19

Hanna complains that he received ineffective assistance of counsel when his attorney proposed an instruction on "ongoing patter of sexual abuse" that contained a judicial comment on the evidence. CP 31.

There is a strong presumption of effective representation of counsel, and the defendant has the burden to show that based on the record, there are no legitimate strategic or tactical reasons for the challenged conduct. *State v. McFarland*, 127 Wn.2d 322, 335-36, 899 P.2d 1251 (1995). "Deficient performance is not shown by matters that go to trial strategy or tactics.' " *State v. Cienfuegos*, 144 Wn.2d 222, 227, 25 P.3d 1011 (2001) (*quoting State v. Hendrickson*, 129 Wn.2d 61, 77-78, 917 P.2d 563 (1996)).

As the Supreme Court explained in *Strickland v. Washington*, 466 U.S. 668, 690, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984):

> Judicial scrutiny of counsel's performance must be highly deferential. It is all too tempting for a defendant to second-guess counsel's assistance after conviction or adverse sentence, and it is all too easy for a court, examining counsel's defense after it has proved unsuccessful, to conclude that a particular act or omission of counsel was unreasonable.

Strickland at 689.

Assuming without conceding that an attorney is deficient when he unnecessarily proposes instructions that he knows the State, as the plaintiff, will be required to propose and which are duplicates of those instructions,[1] Hanna was not prejudiced by this error.

But even deficient performance by counsel "does not warrant setting aside the judgment of a criminal proceeding if the error had no effect on the judgment." *Strickland* 691. A defendant must affirmatively prove prejudice, not simply show that "the errors had some conceivable effect on the outcome." *Strickland* at 693. "In doing so, '[t]he defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome.'" *State v. Crawford*, 159 Wn.2d 86, 99-100, 147 P.3d 1288 (2006) (*quoting Strickland* at 694).

In *State v. Brush*, supra, this instruction was found not to be harmless where the "prolonged" period of time in question was "just longer than a few weeks." *Brush* at 559-60. In contrast, the period of time in this case was substantially longer than a few weeks. It was a period of at

[1] There is no valid reason for a defense attorney to propose instructions unless the instructions relate to a defense being raised or are in some other way helpful to the defendant. When the instruction in question is an identical instruction to one that the State will be required to propose, a defendant should not propose the instruction because if the instruction is erroneous, the error will have been deemed invited or waived.

least six months. The "few weeks" language was unlikely to have been material to the jury's finding where the time period in question was six months. Hanna cannot show that the jury's finding on this aggravator would have been different had the jury instruction omitted the "a few weeks" language which has now been ruled improper.

CONCLUSION

Hanna's judgment and sentence should be affirmed.

DATED this 15th day of October, 2015.

Respectfully submitted:

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October 15, 2015 - 2:17 PM

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